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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 541

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

A. Duda & Sons, Inc., and A. Duda & Sons Cooperative Association (Duda), intervenors-appellees, pursuant to Rule 16(1) (c), Revised Rules of the Supreme Court of the United States, move that final judgment and decree of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered May 19, 1965, by a District Court of three judges specially constituted pursuant to 28 U.S.C., Sections 1336, 1398, 2284 and 2321-2325, inclusive, dismissing an action brought by Florida East Coast Railway in the District Court of the United States for the Middle District of Florida, to enjoin, annul and set aside the enforcement of the order of the Interstate Commerce Commission, dated December 18, 1964, issued in ICC Finance Docket No. 22696, *Atlantic Coast Line Railroad Company Et Al. Construction,* reported, 324 ICC 286 (1964). The decision of the three-Judge Court, *per curiam,* is reported, *Florida East Coast Railway Company* v. *United States,* 242 F.Supp. 490 (1965).

In support of its motion to affirm, Appellees (Duda) adopt as grounds for their motion those advanced in the motions filed, or to be filed, by the Interstate Commerce Commission and Atlantic Coast Line Railroad Company, and in addition, they urge the grounds hereinafter set forth.

QUESTION PRESENTED

The only question presented by the appeal, as set forth in the Jurisdictional Statement, is as follows:

> May the Commission, under section 1(18) of the Interstate Commerce Act, authorize a railroad to construct an extended line of railroad to meet the desires of a single shipper when the public will be permitted to use the new line only with the consent of that shipper?

STATEMENT

Duda adopts by reference the Statement of the Case as set out in the motions filed, or to be filed, by the Commission and the Coast Line. In addition, Duda points out that it is one of the shippers to utilize the Coast Line's extension and that such extension is urgently needed for the orderly mar-

keting of vegetables (Tr. 146).[1] The record also shows that Duda and Gressinger, although separate business enterprises have a close working relationship and frequently interchange produce, and that Gressinger will use the new Duda packing-house facility or construct its own adjacent thereto on land supplied by Duda (Tr. 147, 190, 205-206). The record further shows that Duda will make "land available to anyone who needs it" in order that they might use the Coast Line extension (Tr. 147).

Duda supported the Coast Line application voluntarily, but really had no alternative. Five years prior to asking Coast Line to extend its rails to serve the proposed packing-house and pre-cooling plant to be constructed several miles south of Belle Glade, Florida, Duda sought the services of Florida East Coast (Tr. 137).[2] At that time the congestion and fire hazards in Belle Glade made it imperative that Duda relocate (Tr. 136). But Florida East Coast refused to build the requested line (Tr. 137-139). When operating conditions in Belle Glade became absolutely intolerable, Duda was

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[1]Witness Colbert summarized Duda's needs by stating:

"It boils down to the fact that if we are to serve our customers, the public, in an efficient manner, we must have the proposed railroad facilities." (Tr. 146). Then he stated, ". . . our previous answer certainly indicates how mandatory we feel rail service is to the marketing of our vegetables." He stated that Duda requested Coast Line to build the railroad as quickly as possible, and concluded by saying, ". . . I would like to again emphasize that we need better service and better facilities for our operation than we now have. We need this very quickly and most certainly and respectfully ask the Commission for an early decision in this matter." (Tr. 148-149).

SEE ALSO APPENDIX A herein for affidavit of this same witness filed before the three-Judge Court in support of Duda's Application to Intervene, which details the progress of construction of Duda's new facilities as of January 21, 1965; and Duda's irreparable harm.

[2]Even the Coast Line first appealed to East Coast by letter dated May 22, 1958 (see Appendixes B and C herein) and declared that no objection would be offered if the East Coast would act. But no action was taken by East Coast until after Coast Line acted July 10, 1963.

forced by economic necessity to make plans to relocate and asked Coast Line to obtain a certificate from the Commission permitting it to extend its Okeelanta Branch to the new facility. Coast Line filed the requested application (Tr. 148-149), and then two months later Florida East Coast filed its application to build a line to the Duda property.

On December 11, 1963, less than one month after the hearings were concluded, the coup de grace fell upon Duda. Its facilities at Belle Glade were destroyed by fire. Now, in order to expedite the proceeding, Coast Line, on December 27, 1963, filed petition with the Commission to omit the Examiner's report, and have the case decided initially by Division 3. On January 2, 1964, Florida East Coast filed a reply opposing omission of the Examiner's report and by order of the Commission, served January 21, 1964, the Coast Line's petition was denied. The case then had to run the usual administrative time lag and Duda was forced to take positive steps, notwithstanding the risk involved. The affidavit filed by Duda in opposition to the preliminary injunction before the three-Judge Court (Appendix A) shows that Duda did not begin to make plans to construct the new packinghouse facility until immediately following the Examiner's report of March 13, 1964, recommending that Coast Line be issued a certificate of public convenience and necessity to construct the proposed line of railroad. Then, following the Commission's report of December 18, 1964, favorable to the Coast Line's construction, Duda actually commenced construction of its facility at the site planned for the Coast Line's extension. The precooling plant and packing facility will be ready for full operation when the coming vegetable season opens in November 1965, and rail service to and from that facility is so essential for orderly marketing of produce that Coast Line began construction immediately after the preliminary injunction was vacated.

Purely and simply, this is a matter of two shippers (Duda and Gressinger) moving from obsolete facilities on one railroad to new facilities on another railroad, with the former railroad trying to deny these shippers rail service. Florida East Coast obviously, as the record shows, never has demonstrated any real interest in Duda, nor a valid intention to construct a line of track to the Duda property (Tr. 137-139), and Duda cannot afford the irreparable harm and economic handicap that would come to it if Coast Line's track is not in place and ready to receive traffic by November 1965. (Tr. 141, 145-146).

ARGUMENT

Out of the several questions raised below, the Florida East Coast by this appeal raises only the *contention* that the line will serve only Duda and that neither Gressinger nor anyone else can use the line without Duda's consent. This "private line" argument ignores the plain facts. The record shows that Gressinger & Sons, a partnership, will use the new Duda facility or construct its own facility adjacent thereto (Tr. 147, 190). The record also shows Duda will make land available to anyone who needs it, if Duda property is required to make use of the line (Tr. 147). The map (Appendix D herein) which has been used throughout this proceeding shows that the line of railroad tracks and right-of-way are wholly on the property to the west of Duda's land until it reaches the plant site.

The argument that Duda is a single shipper and no one but Duda can benefit from the line is without substance. Duda is a marketing cooperative of vegetables and produce. The form of the association indicates it is not a single shipper. The very nature of that business means that the public generally deals with Duda and enjoys the use of such facilities. Duda also is a farming corporation and as such receives hundreds of cars of freight inbound annually from

numerous producers of crate material, insecticides and fertilizer manufacturers. If it were true that Duda is a single shipper and the line under construction by Coast Line is a private line, this cause would not be here.

Furthermore, as mentioned above, except for the extreme terminus of the line, none of the Coast Line's extension is even on Duda property. Duda cannot control the use of this line by others. Even if Duda had such selfish desires, the power of eminent domain would give the Coast Line the dominant right to acquire right-of-way to serve others. Actually, the first two and one-half miles of the line is located on right of way owned by Coast Line (Exhibit No. 15) and the balance of the six miles of right of way to the Duda plant was provided by the Serralles interest (Exhibit Nos. 12 and 13). Mr. Serralles testified that land would be made available to other shippers desiring to build on the proposed line (Tr. 177, 184-185). Duda has no ownership or control whatsoever over the property traversed by the Coast Line extension until it reaches its northern terminis and no ownership or control over the rich sugar cane land to the south that must necessarily be devoted to production of some product using rail service.

CONCLUSION

The question stated by Florida East Coast for review by this Court presents no issue of fact or law which warrants further consideration by this court. Florida East Coast, for a number of reasons found by the Commission, cannot provide Duda and Gressinger with their badly needed rail service. Both the Commission and the District Court, acting within the jurisdiction conferred by law on each, fully considered the "private line" and single shipper argument and found such argument lacked merit in law and in fact. It is manifest, therefore, that the question presented by this appeal is so unsubstantial as not to need further argu-

ment in this Court, and that this appeal is taken solely for delay and harrassment.

It is respectfully submitted, therefore, that appellant presents no substantial question for the decision of this Court; that the equities of this case are overbalanced in favor of the opinion below; and that the question presented is so wholly without merit that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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October 1965.